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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re the Marriage of SAUNDRA S. and GREGORY S. BAUER.	
SAUNDRA S. BAUER, Respondent, v. GREGORY S. BAUER, Appellant. .	A124503 (Alameda County Super. Ct. No. V-017362-9)

Appellant Gregory S. Bauer moved to modify the amount of spousal support he pays under the parties' marital settlement agreement to respondent Saundra S. Bauer. The court denied the motion, finding no material change in circumstances that would warrant the requested modification. The issue raised in Gregory's appeal is whether the court's ruling was an abuse of discretion. We conclude that it was not, and affirm the order denying the motion.

I. BACKGROUND

The parties separated in 1998 after nearly 24 years of marriage. They had three children, two of whom were minors when the judgment dissolving the marriage was filed in 2001. The judgment incorporated a marital settlement agreement (MSA) that provided for payment by Gregory of child and spousal support, with spousal support increasing

and child support ending as the minor children reached age 18 and entered college. The MSA provided for continuing support until Saundra's death or remarriage, or further court order, but did not otherwise include a termination date for support, or provide that support was not modifiable. When the motion to modify support was heard in 2009, the parties were both 56 years old, their youngest child was 25 years old, and Gregory was paying $2,101 per month in spousal support pursuant to the MSA.

The parties met while they were in college; after they married, Gregory continued going to college full time while Saundra went to work full time and to college part time. Gregory obtained a college degree in business marketing and was earning $145,869 when he and Saundra separated. Saundra was, in her words, "basically a stay at home mom" from 1978 to 1995, and it took her many years to complete her college education. She went back to college in 1992 to obtain teaching credentials, became accredited in 1995, began teaching that year, and has taught in the same public school district since that time. Saundra's earnings increased each year from 1996 to 2000, when the parties were filing joint tax returns. She earned $34,547 in 1996, $38,051 in 1997, $39,056 in 1998, $41,571 in 1999, and $50,020 in 2000.

The MSA provided that the $2,101 support amount was "based upon a settlement between the parties in which they have compromised their respective positions concerning need and ability to pay, with knowledge of each others' current incomes as set forth in the child support Disso[M]aster calculations attached hereto . . . ." The DissoMaster calculations showed income of $3,669 per month ($44,028 per annum) for Saundra and $11,660 per month ($139,920 per annum) for Gregory in the year 2000.

The income and expense declaration Saundra filed shortly before the February 2009 hearing on Gregory's motion listed average monthly wages of $7,120.25 ($85,443 per annum), and average monthly expenses of $5,951, which included $2,300 per month in savings and investments. Gregory introduced into evidence Saundra's February 2000 income and expense declaration, which listed average monthly income of $3,272.42, and average monthly expenses of $5,270. Saundra conceded at the hearing on the motion that

the $5,270 figure included expenses that she no longer bore for care and support of her children.

Gregory's February 2009 income and expense declaration listed average monthly wages of $11,667 ($140,004), with additional bonus income offset by losses from a rental property. His monthly expenses totaled $5,953, which included savings and investments of $1,581.

The MSA divided the community property in a way the parties acknowledged was "substantially equal." The principal asset awarded to Saundra was the family residence, in which her equity was $227,462 in the summer of 1999. The principal asset Gregory received was a 401(k) account with a value of $210,056.88 on December 31, 1999. Saundra's February 2009 income and expense declaration listed assets of $452,051, which included $414,255 in real estate equity. Gregory's February 2009 income and expense declaration listed $125,000 in assets, approximately $100,000 of which apparently consisted of real estate equity. Gregory's trial brief indicated that he had an IRA worth approximately $400,000. His brief stated that Saundra had "a Roth IRA worth $35,000.00, a Lincoln annuity worth $151,000.00, and a second Lincoln investment of $45,000.00," in addition to vested retirement benefits from her teaching position. Saundra received a $100,000 inheritance from her mother's estate in 2003.

In his trial brief for the hearing on the motion, Gregory argued that a significant change of circumstances had been shown, and that "a termination, or at best, a reservation" of support was warranted under the spousal support standards set forth in Family Code, section 4320.[1] Saundra's points and authorities for the hearing did not discuss the section 4320 factors, and asked the court to "rule on the issue of whether or not [Gregory] has made the requisite showing of a change of circumstances before testimony or evidence is presented on [those] factors." The court granted Saundra's

[1] Unless otherwise indicated, subsequent statutory references are to the Family Code.

request for bifurcation of issues, and agreed at the hearing to "deal with the issue of whether or not there has been a material change of circumstances first."

The "primary" alleged change of circumstances identified by Gregory was Saundra's "dramatic increase in income." Saundra testified at the hearing on the motion that Gregory was aware, when they filed joint tax returns, of the steady pay increases she received working as a teacher. Gregory also cited as changed circumstances Saundra's lower expenses and "substantial assets." His counsel argued at the hearing: "A change of circumstances is per se an increase of income and a decrease of need. If [Gregory's] income had increased, then perhaps there would not be this argument because they both would have increased their incomes, but as [Gregory's] income has remained approximately the same as that reflected in not only the '98 W-2 but that of the DissoMaster calculations attached to the judgment of dissolution filed 2001, then the only changes that have occurred have been those on the part of [Saundra]. Her income has more than doubled and she no longer has any obligation to provide for college, minor or college age children."

In its findings and order after the hearing, the court determined that no material change of circumstances had occurred. The court noted that: the facts were largely undisputed; the parties contributed to their children's college educations; the children had graduated from college; the parties continued to work in the same kinds of jobs they held at the time of their settlement; Gregory's annual income had "essentially stayed the same," increasing from approximately $140,000 at the time of settlement to approximately $146,000; Saundra's income had increased from approximately$50,000 to approximately $85,000.

The court rejected Gregory's arguments that the children's completion of college, and the "change in the [parties'] comparative incomes" constituted material changes in circumstances. The court found that the parties would have anticipated, when they negotiated the MSA, that the children would graduate from college and that costs of their educations would end. The court observed that the parties had planned in the MSA "for the expected emancipation of their two minor children," and reasoned that if Gregory had

intended for college graduations to trigger a reduction in spousal support, he "would have provided for that contingency" in the MSA. The court found that Saundra's changed income would have been "equally foreseeable" given the steady increases in her income reflected in the joint tax returns.

The court further found that the increase in value of the home awarded to Saundra under the MSA and "the decrease in value of the 410(k)" Gregory received in the MSA were not material changes of circumstances. In the court's view, "[p]arties in dissolution actions must be held to anticipate that some assets being divided by them may change in value over the years."

II. DISCUSSION

A. Issue, Burden of Proof, and Scope of Review

" 'Modification of spousal support, even if the prior amount is established by agreement, requires a material change of circumstances since the last order.' . . ." (*In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 396 (*Dietz*).) The party moving for modification has the burden of showing that such a change has occurred. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575 (*Tydlaska*).) The issue turns on " '[t]he facts and circumstances of each case' . . ." (*In re Marriage of Olson* (1993) 14 Cal.App.4th 1, 7 (*Olson*)), and the trial court exercises "broad discretion" in ruling on the matter (*Tydlaska, supra,* 114 Cal.App.4th at p. 575).

It is well settled that orders on modification of spousal support are reviewed solely for abuse of discretion. (E.g., *Dietz, supra,* 176 Cal.App.4th at p. 398; *In re Marriage of West* (2007) 152 Cal.App.4th 240, 246 (*West*); *In re Marriage of Schmir* (2005) 134 Cal.App.4th 43, 47 (*Schmir*); *Tydlaska, supra,* 114 Cal.App.4th at p. 575; *In re Marriage of Lautsbaugh* (1999) 72 Cal.App.4th 1131, 1133 (*Lautsbaugh*); *In re Marriage of Biderman* (1992) 5 Cal.App.4th 409, 412 (*Biderman*); *In re Marriage of Aninger* (1990) 220 Cal.App.3d 230, 237 (*Aninger*).) Such an order can be reversed only for "a clear showing of abuse of discretion" (*Biderman, supra*, at p. 412), where " ' "[i]t can fairly be said that no judge would reasonably make the same order under the same circumstances . . . ." ' " (*Tydlaska, supra,* at p. 575). "[T]he trial court must follow established legal

principles and base its findings on substantial evidence. If the trial court conforms to these requirements its order will be upheld whether or not the appellate court agrees with it or would make the same order if it were a trial court." (*Schmir, supra*, 134 Cal.App.4th at p. 47, fn. omitted.)

Gregory argues for de novo review, citing primarily *In re Marriage of Terry* (2000) 80 Cal.App.4th 921 (*Terry*). However, it was not disputed in *Terry* that there were changed circumstances warranting modification of spousal support; the issue on appeal was whether support should be reduced as the trial court found, or terminated as the supporting spouse argued. The supporting spouse relied on section 4322, which provides that no support shall be ordered or continued where there are no children and the supported spouse acquires a separate estate sufficient for his or her proper support. The majority in *Terry* noted that the facts were not in dispute, and found it appropriate to independently determine whether section 4322 applied. (*Terry, supra,* at pp. 928−929.)

Because section 4322 is not implicated here, we are not called upon to decide whether determinations under that statute are reviewed de novo as the *Terry* majority found, or merely for substantial evidence as the concurrence and dissent maintained (*Terry*, *supra*, 80 Cal.App.4th at p. 937 (conc. & dis. opn. of Sepulveda, J.). Insofar as *Terry* involved changed circumstances, the majority opinion and the concurring and dissenting opinion *agreed* that the abuse of discretion standard of review applied. (*Id.* at p. 928 (maj. opn.), 936−937 (conc. & dis. opn.).) Thus, *Terry* is not persuasive authority for the exercise of de novo review in this case.

B. Relevant Circumstances

For purposes of whether a material change of circumstances has occurred, the relevant circumstances include "all factors affecting need and the ability to pay." (*West, supra,* 152 Cal.App.4th at p. 246.) Relevant circumstances also include all of the considerations set forth in section 4320[2] that bear on an initial award of support—a

[2] Section 4320 provides: "In ordering spousal support under this part, the court shall consider all of the following circumstances:

principle, again, that is well established. (*Terry, supra*, 80 Cal.App.4th at p. 928; *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 77−78; Hogoboom and King, Cal. Practice Guide: Family Law (The Rutter Group 2010) ¶ ¶ 17:145 to 17:146, pp. 17-32.21 to 17-33 (rev. # 1, 2008 & 2010) (hereafter Hogoboom); see also *Dietz, supra*, 176 Cal.App.4th at pp. 396−398; *West, supra*, 152 Cal.App.4th at p. 247; *In re Marriage of Shaughnessy* (2006) 139 Cal.App.4th 1225, 1235−1238; *In re Marriage of Prietsch & Calhoun* (1987) 190 Cal.App.3d 645, 655.) This principle was not observed below by the

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"(a) The extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

"(1) The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

"(2) The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

"(b) The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

"(c) The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

"(d) The needs of each party based on the standard of living established during the marriage.

"(e) The obligations and assets, including the separate property, of each party.

"(f) The duration of the marriage.

"(g) The ability of the supported party to engage in gainful employment without unduly interfering with the interests of dependent children in the custody of the party.

"(h) The age and health of the parties.

"(i) Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties . . . .

"(j) The immediate and specific tax consequences to each party.

"(k) The balance of the hardships to each party.

"(l) The goal that the supported party shall be self-supporting within a reasonable period of time. . . .

"(m) The criminal conviction of an abusive spouse shall be considered in making a reduction or elimination of a spousal support award in accordance with Section 4325.

"(n) Any other factors the court determines are just and equitable."

parties, where Saundra did not brief the section 4320 factors, and Gregory briefed those factors only insofar as they pertained to how much support would be owed after a threshold finding of changed circumstances was made.

The issue of changed circumstances was thus tried as if the section 4320 factors were divorced from that issue. Gregory asserts in his briefing that "modification of spousal support involves a two-step process. First, the moving party must show a material change of circumstances since the last order. . . . Then, the trial court reexamines the [section] 4320 factors and exercises its discretion as to the appropriate amount of support to be paid, if any." However, the authorities cited in the preceding paragraph establish that the section 4320 factors are relevant at the first step of the process.

Given Gregory's contrary understanding, he obviously is not seeking a remand for consideration of section 4320 factors in connection with the changed circumstances issue. What he does argue is that Saundra cannot properly rely on those factors in her appellate briefing on that issue. To the extent Saundra did not raise those factors below, we agree with Gregory—not because the factors are irrelevant, but because a party is not permitted on appeal to change his or her theory of the case. (*Biderman*, *supra*, 5 Cal.App.4th at p. 414.) In any event, relatively few considerations were presented below on the question of changed circumstances, and our discussion will be confined to them.

C. Assets and Marital Standard of Living

Gregory argued below that circumstances had changed because Saundra had acquired "substantial assets," and had a net worth that was significantly higher than his. Gregory's February 2009 trial brief alleged that Saundra had a net worth of $831,000, consisting of $600,000 in real estate equity and $231,000 in retirement savings accounts. The $600,000 equity figure was based on an appraisal of Saundra's home showing a market value of $800,000 in April 2007. Gregory asserted that he had a net worth of $500,000, which included a $400,000 IRA and real estate equity of $100,000.

When Gregory was asked by his counsel at the hearing on the motion whether the MSA provided for a division of assets, Saundra's counsel objected that the subject went

"beyond the scope of material change of circumstances." Gregory's counsel said that she wanted to introduce evidence showing that the value of the parties' assets had changed since they entered into the MSA. In response to the court's request for an offer of proof, Gregory's counsel said that Saundra's equity in the family home had increased in value, but the value of the retirement account Gregory received in the MSA had remained "static due to the market." The court asked Gregory's counsel whether she would be asking the court "to compare '01 and '08 without looking at any intervening years?" When counsel said, "Yes," the court sustained Saundra's objection. Gregory's counsel then offered to introduce testimony that the parties' assets "were worth more a couple of years ago," and the court responded, "[W]ould you like me to take judicial notice that in the U.S. that would describe the assets of many, many people?" Gregory's counsel replied, "Understood," and the court said, "The ruling stands." When Gregory's counsel later sought to elicit testimony from him that the value of his separate estate had not changed since 2001, the court reiterated its prior ruling excluding such evidence.

Gregory argues on appeal that the court thus erroneously excluded as irrelevant evidence of "changes in the parties' respective financial circumstances" after the MSA. "A spouse's separate estate (including asset allocations as a result of the community property division)—and the reasonable income potential therefrom—may require . . . a termination of previously-awarded support . . . ." (Hogoboom, *supra,* ¶ 6:908, pp. 6-328 to 6-329 (rev. #1, 2007).) Gregory is therefore correct that the parties' assets were relevant in determining whether changed circumstances warranted modification of spousal support. When the point was first raised at the hearing on the motion, Gregory appeared to be focusing solely on the values of assets received in the MSA, which, in isolation, *were* irrelevant, but the court later extended its initial ruling to preclude testimony about the value of Gregory's separate estate as whole. Gregory should have focused on the value of Saundra's estate, and its "reasonable income potential" (*ibid.*), but the court at least arguably erred in excluding evidence of the parties' respective assets and their changes in value after the MSA.

Any error was harmless, however, for a number of reasons:

First, while the parties' assets are relevant to spousal support, they are less significant than the parties' incomes. (See *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 305 [it would be " '[h]ighly unusual for a court to use assets more than income as a basis for determining [spousal] support' "].) As explained below, the income evidence in this case did not dictate a finding of changed circumstances, and it is unlikely that assets evidence would have tipped the balance the other way on that issue.

Second, it is unlikely that the court would have found as great a difference in net worth as Gregory alleged. Gregory claimed that Saundra had $600,000 of equity in her home, but the court would likely have accepted the $414,255 equity figure Saundra listed on her February 2009 income and expense declaration rather than the higher figure, which was based on a two-year-old appraisal. The $185,745 difference between these figures accounted for more than one-half of the alleged $331,000 disparity in net worth.

Third, while the parties' assets had changed since the MSA, the changes were similar. The primary assets received in the MSA had both roughly doubled in value: Saundra's home equity increased from $227,462 to $414,255, and the value of Gregory's retirement account increased from $210,056.88 to $400,000. Saundra received no substantial retirement account in the MSA, but she had accumulated significant retirement savings; Gregory received no real estate in the MSA, but he had purchased a residence and a rental property.

Fourth, even if the court had been persuaded that Saundra had acquired assets that were substantial, and significantly greater than those of Gregory, it is unlikely, given the nature of those assets, that the court would have required Saundra to use them for her support. In *Dietz*, *supra*, 176 Cal.App.4th at page 402, for example, modification of spousal support was inappropriate because among other things "the majority of [the supported spouse's] assets, namely, the family residence, were 'illiquid' . . . ." (See also *In re Marriage of McTiernan & Dubrow* (2005) 133 Cal.App.4th 1090, 1108 [supported spouse's "home of many years" should not have been included among assets available for

her support].)[3] As for Saundra's retirement savings, no proof was offered that she could draw on them without penalty. (Compare *Schmir*, *supra*, 134 Cal.App.4th at pp. 50−53 [supported spouse's ability to withdraw funds from her retirement account without penalty was a changed circumstance; trial court did not abuse its discretion in requiring her to make such withdrawals to support herself].) As explained in *Olson*, *supra*, 14 Cal.App.4th at pages 12−13: "Withdrawals from retirement plans, when made, are treated as ordinary income and taxable as such. However, withdrawals made prior to the time the participant reaches age 59 [and] 1/2, in most cases, are not only taxed as ordinary income, but are subject to a 10 percent penalty because of withdrawal prior to normal retirement age. For this reason, it would appear to be an abuse of discretion to order an amount of spousal support based on funds in a retirement plan which if withdrawn, would be subject to this penalty."

Accordingly, it is not reasonably probable that the result would have been different if the court had considered the parties' assets and net worth in making its changed circumstances determination. (Evid. Code, § 354 [no reversal for erroneous exclusion of evidence unless error caused a miscarriage of justice].)

Gregory contends that Saundra's $100,000 inheritance was a material change of circumstance. However, no showing was made that Saundra mismanaged the inherited funds (see Hogoboom, *supra*, ¶ 6:905, p. 6-328 (rev. # 1, 2007) [mismanagement of assets that could have provided for accustomed lifestyle may justify termination of support]), or that any of the funds, which she received in 2003, were available to pay for her support in 2009 (see *Dietz*, *supra*, 176 Cal.App.4th at pp. 401−402 [although

[3] Gregory argues in his opening brief that "changes in the parties' respective financial circumstances may constitute a change of circumstances" for purposes of modifying support, and asks in the discussion under that heading, "Since equity in a residence is clearly an asset, under what authority can it be excluded from consideration any more than money in a savings account?" Gregory then confusingly states in his reply brief that "[w]hile he agrees that [Saundra's] increased equity is not a 'changed circumstance' for modification of spousal support, neither can it be ignored." Since it is difficult to know what is being argued and what is not, we address the changed values of the major assets, including the former family residence.

supported spouse inherited $400,000, funds were used to renovate her residence and were not available for support]). Consequently, the court was not required as a matter of law to find that the inheritance constituted a changed circumstance.

Gregory contends that the court erred in excluding evidence on the parties' marital standard of living, which, he asserts, would have shown "that Saundra was living at or above it and he well below it." Saundra's counsel objected when Gregory's counsel started to ask him about the kind of residence in which he and Saundra had lived, on the ground that the evidence was "irrelevant to material change of circumstances." The court asked Gregory's counsel for an offer of proof, counsel asked the court whether it wanted to "hear about marital standard of living," and the court said, "No," adding that "[W]e now don't have a huge amount of time remaining this afternoon on material change of circumstances."

Marital "standard of living" is a section 4320 factor that bears on spousal support and its modification. (§ 4320, subds. (a) & (d); see *Terry*, *supra*, 80 Cal.App.4th at p. 928, and other authorities cited *ante* on the relevance of § 4320 factors.) As we have observed, the issue of changed circumstances was tried in this case on the erroneous assumption, fostered by the parties, that section 4320 factors were not germane to that issue. Having invited the error below, Gregory cannot complain of it on appeal. (See generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 389, p. 447 [theory of invited error].)

D. Income and Expenses

Gregory's argument for changed circumstances rests primarily on the increase in Saundra's income, and the decrease in her expenses, since the MSA. The evidence showed that Saundra's expenses exceeded her income at the time of the MSA, and that, apart from amounts she was saving, her income exceeded her expenses at the time of the modification motion.[4] This evidence could well have supported a finding of materially

[4] Gregory argues that the trial court erroneously believed it was irrelevant that Saundra had become self-supporting, because the court sustained an objection when he sought to testify on the subject. However, the court said it precluded such questioning

changed circumstances. As we stated in *West, supra*, 152 Cal.App.4th at page 246, changed circumstances include "an increase or decrease in the supported spouse's needs." (E.g., *Schmir, supra*, 134 Cal.App.4th at p. 50 [supported spouse's reduced medical expenses were a changed circumstance].)

On the other hand, a line of authority indicates that, in determining whether a material change of circumstances has occurred, the court can properly consider the parties' expectations at the time of the original support order. (See *Dietz, supra*, 176 Cal.App.4th at pp. 398−399; *Lautsbaugh, supra*, 72 Cal.App.4th at pp. 1133−1134,[5] *Biderman, supra*, 5 Cal.App.4th at pp. 413−414; *Aninger, supra*, 220 Cal.App.3d at pp. 238−243.) The court here could reasonably find that the parties would have expected, when they entered into the MSA, that Saundra's expenses would eventually decrease when their children graduated from college, and that her income would continue to increase as it had done in the past. Since there was no " 'failed expectation' or 'failed assumption' " (*Biderman, supra*, at p. 413) with respect to the changes in Saundra's income or expenses, the court could reasonably conclude that those changes were not materially altered circumstances that permitted a modification of support. Thus, while a contrary conclusion could have been drawn, the court's decision cannot be deemed an abuse of discretion.

Gregory submits that the trial court's reasoning precludes Saundra's increased income from ever being considered a changed circumstance, and thereby impermissibly amends the MSA to make support "essentially nonmodifiable." However, Saundra's raises are only one factor among many others that may bear on her entitlement to spousal support, our review extends only to whether the trial court's assessment of that factor was

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not because Saundra's ability to be self-supporting was irrelevant, but rather because the subject was not a proper subject for lay opinion testimony.

[5] *Lautsbaugh*'s specific holding that termination of child support could not be considered a change of circumstance for modification of spousal support was abrogated by a subsequent statutory enactment (§ 4326, subd. (a) [termination of child support order is a changed circumstance]), but the more general proposition we apply here was not.

reasonable, and nothing in our opinion prevents Gregory from renewing a request for modification of support as the parties' circumstances continue to evolve.

III. CONCLUSION

The order denying the motion to modify spousal support is affirmed.

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Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Dondero, J.